No. 95-5015 (10)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LARRY GRANT LONCHAR,
Petitioner,

v.

A. G. THOMAS, WARDEN,
GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit properly invoked a free-form notion of "abuse of the writ" to dismiss a condemned prisoner's first federal habeas petition on the grounds that the prisoner failed to provide a good reason for not filing sooner, filed shortly before his scheduled execution, and filed for improper subjective personal motives, notwithstanding that the petition concededly raised substantial claims of denial of federal rights, and that the petitioner had previously received repeated explicit assurances from state and federal courts that he could adjudicate his federal claims "at any time" up until his execution.

II. Whether the Eleventh Circuit properly applied its new standard for dismissal of first habeas petitions to petitioner notwithstanding that he lacked any advance notice of the substantial change in the law brought about by the new standard.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 58 F.3d 590 (11th Cir. 1995), and is reprinted in the joint appendix ("J.A.") at 545. The opinion of the United States District Court for the Northern District of Georgia is unreported, and is reprinted in the joint appendix at 53.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 28, 1995. This Court entered a stay of execution and granted certiorari on June 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 2244(b)

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a Justice or judge of the United States release from custody or other remedy on an application for writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court, shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 9 of the Rules Governing Cases Under Section 2254:

> (a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of due diligence before the circumstances prejudicial to the state occurred.
>
> (b) Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petition constituted an abuse of the writ.

STATEMENT OF THE CASE

In this case, a federal court refused to permit consideration of a condemned prisoner's first petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. The court did not do so because of any infirmity in the substance of claims presented. Indeed, it is conceded by all that the petition presents substantial claims for relief. Rather, the court acted for reasons peculiar to the tortured procedural history of this case—principally that petitioner Lonchar failed to take advantage of opportunities to present his federal claims sooner in the context of putative next-friend proceedings filed in his behalf, waited until his execution date was near before filing, and had improper subjective personal motives for seeking relief. Invoking a free-form notion of "abuse of the writ," the Eleventh Circuit held that a district court was free to dismiss a first petition summarily on these grounds. As we will show, however, the court's ruling lacked any foundation in law or in equity. To the contrary, in this case Lonchar did no more than what both state and federal courts repeatedly assured him he could do: file a first habeas petition in his own behalf "at any time" before his scheduled execution. Thus, however understandable the frustration of the Eleventh Circuit at the course of events in this case, it was simply wrong to dismiss Lonchar's petition.

A. The Trial and Direct Appeal

In 1986, Larry Grant Lonchar was arrested along with a codefendant and charged with three counts of murder and one count of aggravated assault. Following trial by a jury in the Superior Court of DeKalb County, Georgia, before Judge Robert J. Castellani, Lonchar was found

guilty on June 27, 1987, and sentenced to death by electrocution.

Throughout the proceedings, Lonchar displayed a powerful suicidal impulse—an impulse consistent with the serious mental illness he had struggled with throughout his life.[1] Upon arrest in Texas, Lonchar ran toward the arresting officer, yelling "shoot me, shoot me."[2] Shortly after his arrest, Lonchar told an interrogating officer "it was pointless to tell anyone about [the crime], that he just wanted to get it [the trial] over with and die."[3] He repeatedly told the same detective, and his former parole officer,[4] about a cemetery plot that he had asked his family to purchase. Records from the DeKalb County Jail, where Lonchar was held pending trial, show him under constant suicide watch due to extreme depression.[5]

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[1] Records of Lonchar's previous incarcerations, and records from psychological examinations conducted after he was sentenced to death, show a consistent pattern of serious depression and suicidal impulses. *See* 5/28/76 Psychological Screening Report in Petitioner's Appendix to Petition for Writ of Habeas Corpus at Section E, *Kellogg v. Zant*, No. 90-V-2735 (Butts Co. Sup. Ct., March 28, 1990).

[2] Oral Statement of Defendant at Time of Arrest on 10/20/86, *in* Record on Appeal at 205 (Ga. 1987).

[3] J.A. 540, 541.

[4] Lonchar's former parole officer, Amber Watson, who had told Lonchar to seek psychological help just before the crime, detailed Lonchar's serious depression. Summary of Conversations Between Amber Watson and Larry Lonchar Subsequent to His Arrest, in Record on Appeal at 206 (6/5/87).

[5] *See* Petitioner's Appendix to Petition for Writ of Habeas Corpus at Section F, *Kellogg v. Zant*, No. 90-V-2735 (Butts Co. Sup. Ct., March 28, 1990). Shortly after Petitioner was arrested, the jail health personnel met with him and made the following observation: "He says he has never been happy and now he is going to die in the electric chair and maybe he will be happy in another life. He says his family has already retained a grave site

According to prison mental health records, Lonchar did "not want to live. Sees no future for himself and does not even want his lawyer to defend him."[6] At one point the records indicated he was a "high suicide risk."[7] After being sentenced to death, the doctors noted that Lonchar "appears 'pleased.' 'I got what I wanted.' He says he has no intention to kill himself now because they will do it for him."[8]

Consistent with the self-destructive impulses and sense of helplessness that characterize serious depression, Lonchar refused to cooperate with his attorney in preparing his defense. As Lonchar told the court, "[a]s far as being present and assisting Mr. Leipold I haven't assisted Mr. Leipold since he has taken this case. I have told him things, I have never told him the truth . . . I have never told him what happened, so, how can he assist me."[9] At an *in camera* hearing, Lonchar's lawyer told the trial judge that Lonchar was refusing to cooperate, and that he could obtain relevant information only through the district attorney.[10] After these comments, the attorney stated: "We have some serious problems right here now with what has just been said. I mean, I don't even know what to go forward with now."[11] Thus, Lonchar's trial counsel was effectively precluded from putting on a defense even though Lonchar did not confess to the crimes, there was no eyewitness testimony that Lonchar killed

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in Michigan for him at his request." Doctor's Progress Notes, 11/3/86.

[6] Doctor's Progress Notes of 5/20/87, Kellogg Petition for Habeas Corpus, Appendix F.

[7] Doctors Progress Notes, 12/11/86.

[8] Doctor's Progress Notes of 6/29/87.

[9] Trial Tr. at 61 (J.A. 400).

[10] 1987 *In Camera* hearing at 2-3 (J.A. 392).

[11] Trial Tr. at 61 (J.A. 400).

any of the victims, there was strong circumstantial evidence that Lonchar's codefendant had committed the murders, and the codefendant indisputably committed the aggravated assault.

Perhaps the most striking manifestation of Lonchar's instinct for self-destruction was his insistence that he not be present during trial. Lonchar told the court that "[m]y presence [at trial] is irrelevant. . . . I know what is going to happen in this case and, you know, there is nothing I can do about it."[12] After arguing with Lonchar about whether the trial was a "foregone conclusion," the judge told him, "I am sorry you feel that way. But all I can do is advise you as to what your rights are and advice [sic] you what your alternatives are."[13] After this colloquy, the judge permitted the trial to go forward with Lonchar absent. Lonchar did not testify, and appeared before the jury only briefly for identification purposes.[14] At the sentencing proceeding, however, Judge Castellani reversed course, countermanding Lonchar's insistence that his attorney not put on a case in mitigation.[15]

Notwithstanding counsel's extreme handicaps in mounting any defense on Lonchar's behalf, the jury struggled with the decision whether to impose death. Counsel for the defense asked for an instruction that he would serve 30 years if not given the death penalty. The prosecution stipulated that the instruction was legally accurate, but objected on the ground that Georgia law precluded any mention of parole at sentencing. The trial court declined to give the instruction. Despite the absence of an instruction, the jury, after a lengthy deliberation, requested an

[12] Trial Tr. at 64-65 (J.A. 402).

[13] Trial Tr. at 66 (J.A. 403).

[14] These facts would appear to create a clear entitlement to relief in the Eleventh Circuit. *See Hall v. Wainwright*, 733 F.2d 766, 775 (11th Cir. 1984).

[15] Trial Tr. at 1341-44 (J.A. 414-18).

instruction on how long Lonchar would serve were he given a life sentence. The trial court refused to answer the question. After further deliberation, the jury returned a death sentence.[16]

Following the denial of a motion for a new trial, Lonchar's attorney appealed to the Georgia Supreme Court on December 4, 1987. Lonchar objected, but the court rejected his position on the ground that appellate review was mandatory under Georgia law.[17] The Georgia Supreme Court affirmed on July 13, 1988, *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988). Lonchar then departed from his self-destructive course and authorized the filing of a petition for certiorari, which was denied. *Lonchar v. Georgia*, 488 U.S. 1019 (1989).

B. The 1990 Kellogg Next Friend Petition

In early March 1990, the Superior Court of DeKalb Country (per Judge Castellani) issued a warrant authorizing Lonchar's execution during the period March 23 to March 30.[18] Lonchar's sister, Chris Kellogg, filed a next-

[16] Trial Tr. at 1332, 1337-38, 1361, 1457-58, 1465.

These facts would appear to give rise to a clear Eighth Amendment violation. *See Simmons v. South Carolina*, 114 S. Ct. 2187 (1994). Additionally, they form the basis for a claim of ineffective assistance of appellate counsel in this case. *See generally Evitts v. Lucey*, 469 U.S. 387 (1985). Despite having been alerted to the existence of this claim, appellate counsel on direct review inexplicably failed to include it. *See* Petition for Writ of Habeas Corpus, *Lonchar v. Thomas*, No. 1:95-CV-1656-JTC (N.D. Ga., June 26, 1995).

[17] The defense attorney, prosecutors and the trial judge all agreed that Georgia's mandatory appeal process for capital cases overrode Lonchar's wishes. Hearing on Motion for A New Trial, 3, 7 (11/2/87) (J.A. 418-21).

[18] Lonchar had sent the trial court a series of letters asking to be put to death, as the Georgia Supreme Court noted. *Kellogg v. Zant*, 260 Ga. 182 n.1, 390 S.E.2d 839 n.1 (1990) (commenting that immediately after this Court's denial of certiorari on direct appeal, Mr. Lonchar petitioned the trial court to "sign the death warrant").

friend petition for habeas corpus in state court on March 21, 1990. The petition detailed Lonchar's history of serious mental illness, presented new psychological evaluations, and set forth 16 claims for relief—most of which focused on the risk that Lonchar had not received a fair trial and sentencing as a result of his mental illness.[19]

The court held a hearing in March, 1990. Although Lonchar declined to proceed at the time, the judge told him during the hearing that "if you change your mind, you still have at least, for the time being an option to proceed." (J.A. 427). Later, approximately 24 hours before the scheduled execution, the court cautioned Lonchar that "I wouldn't wait until I was ready to sit in that chair and make that decision because at that point it may be too late."[20] But the court was equally clear even then that, although the next friend petition had to be dismissed based on the court's finding that Lonchar was competent, Lonchar could still choose to initiate his own habeas petition: "[Lonchar] certainly has the ability to in effect sto[p] [the execution] for the time being. The stay would in all likelihood have to be entered because there are claims in the petition or any petition that he could file that would require an evidentiary hearing. There is obvious not enough time and a stay would have to be entered."[21]

On March 28th, the court issued an order finding Lonchar competent and dismissing the next-friend petition

[19] The key claims focused on the trial court's failure to conduct a competency hearing (Claim I); the impermissibility of trying an incompetent person (Claim II); the insufficiency of the trial court's inquiry into Lonchar's ability to be absent from most of the trial (Claim III); and the failure of Lonchar's attorney to adequately investigate Petitioner's mental illness (Claim IV).

[20] 3/28/90 Hearing at 373 (J.A. 433).

[21] (3/28/90 hearing at 374, J.A. 434). Recognizing Lonchar's continuing right to file an appeal, the judge granted an access order to Lonchar's attorney in case Lonchar changed his mind. 3/28/90 hearing at 378-79, 381 (J.A. 439).

for lack of standing. *Kellogg v. Zant*, No. 90-V-2735 (J.A. 2). The Georgia Supreme Court affirmed. *Kellogg v. Zant*, 260 Ga. 184, 390 S.E.2d 841, *cert. denied*, 498 U.S. 890 (1990).

On October 23, 1990, Chris Kellogg filed a next-friend habeas petition in federal court, presenting the same claims presented in her state petition.[22] On August 13, 1991, the court (per Judge Camp) ordered an evidentiary hearing to determine Lonchar's competence (and thus Kellogg's standing).[23] The court declined to afford a presumption of correctness to the state court finding that Lonchar was competent, on the ground that the state court had failed to afford Kellogg a "full and fair" hearing on that issue. In that regard, the court noted that one state's expert had testified about Lonchar's mental state without ever having evaluated him.[24]

The federal evidentary hearing was held on November 12-14, 1991. The court received testimony from three psychiatrists who, based on recent examinations, all con-

[22] The District Court (per Judge Camp) could not assume jurisdiction until June 1991, when the state proceedings were finally concluded. *See Kellogg v. Zant*, No. 1:90-CV-2336-JTC (N.D.Ga. Apr. 18, 1991) (order directing parties to notify the court when state habeas proceedings were final so that District Court could assume jurisdiction).

[23] *Kellogg v. Zant*, No. 1:90-CV-2336-JTC (N.D.Ga. Aug. 18, 1991) (order deferring Respondent's motion to dismiss) (hereinafter *"Order of 8/13"*).

[24] *Order of 8/13* at 12 ("[i]n the rush to execute Mr. Lonchar, the state court compromised the adequacy of the competency hearing"). Judge Camp concluded that the state court exacerbated time constraints by failing to give Ms. Kellogg adequate notice of the hearing, compromised her ability to call witnesses and rebut the state's evidence, and unfairly excluded evidence when its improper form was due to time constraints. *Order of 8/13* at 8-11. The court also noted that "[a]n unfortunate collateral consequence of the State's unwillingness to delay the original execution date by a few days [was] a substantial increase in the length of these proceedings." *Id.* (J.A. 18).

cluded that Lonchar suffered from serious depression. One expert concluded that Lonchar suffered from bipolar disorder (i.e. he was manic depressive), and that this condition disabled him from deciding rationally whether to pursue his constitutional claims. The other two concluded that Lonchar, though suffering from serious depression, was not manic-depressive, and could make a rational decision whether to proceed.[25]

Judge Camp also examined Lonchar directly. The judge inquired into Lonchar's professed desire to forgo postconviction relief, and into Lonchar's understanding of the consequences of not filing a habeas petition.[26] He specifically asked Lonchar whether he understood that at "*any time you can change your mind up until the time your, of course, sentence is executed, and bring a petition for habeas corpus?*" [27] Immediately after Judge Camp made that statement, the following colloquy occurred:

> Q: Now, if I understand the law correctly . . . a habeas corpus proceeding in federal court, *although if you abandon this proceeding you have to bring one in the future*, but if you choose not to bring a habeas corpus proceeding in federal court, that is the last available means of relief that would be available to you from your sentence. Is my perception in that regard correct, counsel, based on the record in this case?
>
> [Both attorneys answer in the affirmative]
>
> Q: Do you understand that, Mr. Lonchar?
>
> A: Yes.[28]

On February 18, 1992, the district court entered an order finding Lonchar competent and dismissing the next-

[25] Evidentiary Hearing, *Kellogg v. Zant*, No. 1-90-CV-2336-JTC (N.D. Ga.), Nov. 12-14, 1986.

[26] Nov. 1991 Tr. at 437-439 (J.A. 442-45).

[27] Nov. 1991 Tr. at 443 (emphasis added) (J.A. 447).

[28] Nov. 1991 Tr. at 444 (emphasis added) (J.A. 447).

friend petition for lack of standing.[29] Despite Judge Camp's assurance that Lonchar could bring a habeas petition at any time in the future, the order made reference to a "waiver" by Lonchar of further appeals. But the order also stated that the sole issue before the court was Kellogg's standing, which depended on whether was found competent.[30] On March 12th, the court granted a certificate of probable cause to appeal.

On November 13, 1992, the Eleventh Circuit affirmed. *Lonchar v. Zant*, 978 F.2d 637, 642 (11th Cir. 1992). The court held that because Kellogg could not prove Lonchar was "unable to litigate his own cause," *id.* at 643, she failed to establish standing. Certiorari was denied on February 24, 1993. *Lonchar v. Zant*, 113 S.Ct. 1378 (1993).

C. Lonchar's 1993 State Habeas Proceedings

In early February 1993, while the petition for certiorari was pending, the DeKalb County Superior Court (per Judge Castellani) issued a warrant authorizing Lonchar's execution during the period February 24 to March 2. The execution was scheduled for February 24th. On that date, Judge Castellani, who had presided over Lonchar's trial and sentencing and issued the death warrant, visited Lonchar in the penitentiary and met with him privately.[31] One of Lonchar's lawyers also informed Lonchar by telephone that his brother had threatened to commit suicide if Lonchar did not seek to stop the scheduled execution.

[29] Although he accepted the psychiatrists' unanimous opinion that Lonchar had a mental illness, p. 9, 11, Judge Camp found that the standard established in *Rees v. Peyton*, 384 U.S. 312, 314 (1966), was not met. (J.A. 20, 30).

[30] Slip op. at 7 (citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (J.A. 24).

[31] Motion to Disqualify Judge, filed in *State v. Lonchar*, No. 86-CR-3747 (June 13, 1995), and affidavit of Stephen Bayliss attached thereto. (J.A. 164).

Shortly after these conversations, Lonchar agreed to allow a state habeas petition to be filed in his own behalf. The petition was filed, and the execution was stayed.

On April 6, 1993, the case was assigned to Judge Cook-Connelly. In July 1993, Lonchar indicated that he wished to dismiss the petition. The court set a hearing for October 29, 1993 to ascertain Lonchar's intentions. Because of a serious injury to Lonchar's attorney, the court continued the hearing indefinitely.[32] The hearing was eventually set for April 19, 1994, but rescheduled again on the court's initiative. On June 23rd, the hearing was held. Lonchar's counsel objected to the court's inquiry into Lonchar's desires, claiming that there was sufficient evidence to doubt his competency.[33] The court rejected this argument, and asked Lonchar to testify as to his intentions with respect to the petition. Lonchar testified that he no longer wanted to pursue the petition. The court dismissed the petition, reserving the issue whether the dismissal was with prejudice.[34] On July 1, 1994, Lonchar's counsel submitted a brief opposing dismissal with prejudice.[35] Shortly thereafter the state chose to concede that dismissal without prejudice would be appropriate, and submitted a proposed order to that effect.[36] Six months later (and less than six months before the proceedings now at issue), in January 1995, the court

[32] *See* Prehearing Brief on Behalf of Respondent at 8-9 (Super. Ct. Butts County June 20, 1994).

[33] *See* Transcript of Proceedings Heard Before Honorable Kristina Cook Connelly at 9-10 (Butts Co. Sup. Ct., June 23, 1994) (J.A. 451).

[34] *See id.* at 36 (J.A. 470).

[35] *See* Brief in Opposition to Dismissal With Prejudice (Butts Co. Sup. Ct., July 1, 1994). (J.A. 161).

[36] *See* Response to Counsel's Brief in Opposition to Dismissal With Prejudice at 2 (Butts Co. Sup. Ct., July 6, 1994), at 3 (J.A. 161).

entered an order dismissing Lonchar's petition without prejudice.[37]

On February 13, 1995, Lonchar's attorneys sought reconsideration of the dismissal, on the grounds of Lonchar's incompetence.[38] The motion was denied on February 23, 1995. (J.A. 33). The Supreme Court of Georgia denied a certificate of probable cause to appeal on April 4th, and denied rehearing and remanded the case on May 4th.

D. The 1995 Milan Lonchar Next-Friend Petition

On June 8, 1995, the DeKalb County Court (per Judge Castellani) issued an execution warrant authorizing Lonchar's execution during the period June 23 through June 30. On June 20th, Milan Lonchar, petitioner's brother, filed a next friend habeas corpus petition in Butts County Superior Court. The petition was accompanied by affidavits from two psychologists who testified that Lonchar's bizarre behavior, a 1993 suicide attempt in prison, his vacillation as to whether he wanted to live or die, and his confessions that he lied to experts during prior evaluations in order to mask the extent of his mental illness, necessitated a new competency evaluation.[39] Dr. Davis, one of the state's own experts in the

[37] *See* Order of Dismissal, Jan. 16, 1995 (J.A. 34).

[38] In support of their motion for reconsideration, the attorneys pointed out that the last competency evaluation of Lonchar had taken place more than three years earlier, and thus the judge's failure to conduct a new evidentiary hearing and to accept *ex parte* presentation of recent information regarding Lonchar's competency required reconsideration before Lonchar could be executed. Petitioner's Motion to Reconsider Dismissal of Petition for Writ of Habeas Corpus, Denial of An Evidentiary Hearing on Competency and Voluntariness Issues, and Refusal to Permit *Ex Parte* Presentation of Privileged Information Indicating Incompetency and Involuntariness, *Lonchar v. Zant*, No. 93-V-99 (Butts Co. Sup. Ct., Jan. 1, 1995).

[39] Dr. Herendeen, who had been treating Lonchar informally, submitted an affidavit containing the following conclusions:

> ¶ 7 ("Based on the sum of my experience with Mr. Lonchar and may review of the materials concerning his case, it is

1991 competency hearing in *Kellogg v. Zant*, submitted an affidavit concluding that his prior finding that Lonchar was competent was no longer reliable due to Lonchar's unpredictable and irrational actions.[40]

Milan Lonchar also sought an order permitting a psychological evaluation. Attached to this motion was a sworn statement dated June 9, 1995, by Larry Lonchar expressing his consent to be given a formal psychological evaluation.[41] At oral argument, however, Lonchar stated that he wished not to be examined, and declared his op-

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my opinion . . . that Mr. Lonchar is currently incompetent to waive his habeas corpus appeals, and that his decision is a voluntary one.").

¶ 10 ("The most obviously significant event since Mr. Lonchar's last evaluation occurred in February 1993, when he signed papers just thirty minutes before the time scheduled for his execution, authorizing his attorneys to seek a stay of execution and pursue a habeas petition on his behalf").

¶ 12 ("In May 1993, Mr. Lonchar attempted suicide by slashing his wrist with a sharp object. When prison officers blocked the suicide attempt. Mr. Lonchar's depression deepened. The psychological processes which led to Mr. Lonchar taking this drastic and irrational action must be thoroughly evaluated, and a professional assessment of Mr. Lonchar's current mental capacity must consider this event.").

¶ 14 ("Mr. Lonchar has concealed his history of manic episodes from those evaluators [in 1991], which deprived them of the information essential to a proper diagnosis. Mr. Lonchar has said that he lied to the state experts when they asked him whether he had ever had manic phases, and that he couldn't believe they did not evaluate him in a context and environment in which his manic episodes would have been revealed to them. As a rsult, the conclusion of the state evaluators that bipolar disorder could be ruled out . . . can no longer be credited").

(J.A. 273-78)

[40] *See id.* Ex. C (J.A. 281).

[41] *See* Mot. for Order Permitting Psychological Evaluation Ex. A (Butts Co. Sup. Ct., June 20, 1995) (J.A. 285, 295).

position to the next friend petition.[42] Relying on Larry Lonchar's mercurial self-assessment (which was unsworn), and a 1991 competency finding (which rested on an expert opinion that was no longer reliable according to the sworn statement of the state expert who rendered it), the court found Lonchar competent, and dismissed Milan Lonchar's petition for lack of standing. *Lonchar v. Thomas*, No. 95-V-238 (Butts Co. Sup. Ct. June 21, 1995) (J.A. 35). The Georgia Supreme Court denied a certificate of probable cause. *Lonchar v. Thomas*, No. S95H1500 (Ga. June 22, 1995) (J.A. 37).

On June 22, 1995, Milan Lonchar filed a next-friend habeas petition in federal court. Without an evidentiary hearing, the district court (per Judge Camp) summarily rejected Milan Lonchar's request for a formal psychological evaluation of Lonchar's competency, and dismissed the next-friend petition for lack of standing. *Lonchar v. Thomas*, No. 1:95-CV-1600-JTC (N.D. Ga. June 22, 1995). The Eleventh Circuit denied a certificate of probable cause to appeal. *Lonchar v. Thomas*, 58 F.3d 588 (11th Cir. June 23, 1995).

E. Lonchar's 1995 State Habeas Proceedings

On June 23rd, Larry Lonchar filed a petition for habeas corpus relief in his own behalf in the Superior Court of Butts County. The State moved to dismiss. A hearing was held on the 23rd. Lonchar was placed under oath, and asked by the court whether he sought to pursue the claims for relief contained in the petition. He answered that he did wish to pursue the claims, and that he was doing so in order to give the legislature time to change the method of execution so that Lonchar could donate his organs should he be put to death. The court then sought to have Lonchar verify that he wished to

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[42] Hearing Transcript, Milan Lonchar v. Thomas, No. 95-V-328 (Butts Co. Sup. Ct. June 21, 1995), at 3, 12, 15-17, 25, 30 (J.A. 483).

pursue each of the individual claims set forth in the petition. Lonchar affirmed his intent to pursue each specific claim set forth in the petition. (J.A. 492-96). The court also inquired into whether Lonchar had "waived" his federal claims. Counsel for the state responded that, based on a review of the record of the prior proceedings, "no specific waiver on the record in any particular proceeding" was found.[43]

On June 25th, the court issued an order dismissing the petition. Notwithstanding Lonchar's testimony that he did wish to pursue all of the claims set forth in the petition, the court held on the basis of "demeanor" evidence that Lonchar did not genuinely intend to pursue most of his claims for relief. Shortly after the order was issued, Lonchar filed a motion for reconsideration, which included a verification by him emphatically repeating his desire to pursue all claims for relief. (J.A. 370, 373).

F. The Federal Habeas Proceedings

On June 26, 1995, Lonchar filed the federal habeas petition presently at issue. The state moved to dismiss on June 27th. The state argued that Lonchar's petition should be denied because Lonchar had the opportunity to bring his federal constitutional claims earlier, but had, in effect, abandoned them by failing to adopt the pleading ostensibly filed in his behalf in the next friend proceedings. The state also argued that Lonchar had waived his federal claims, and that some of the claims were procedurally defaulted. The state reserved the option to invoke laches under Habeas Rule 9(a), but admitted it did "not have the information to make the showing of prejudice" at that time.[44]

In a supplemental brief filed in support of the motion, the state argued that *McCleskey v. Zant*, 499 U.S. 467

[43] June 23 Hearing Tr. at 21 (J.A. 499).

[44] Motion to Dismiss, at 24 (J.A. 387).

(1991), controlled. The state argued for dismissal based on "objective factors, including the facts that petitioner has refused to participate in two separate [next friend] federal habeas corpus petitions, for whatever reasons, and that nothing has been presented in this court which could not have been raised in the earlier proceedings." The state argued that "Mr. Lonchar's motivation is not the controlling factor" in this inquiry, but that his conduct was "abusive" because "he was aware of his rights, had discussed the issues with counsel and could have raised these claims at the time the next friend petitions were filed."[45]

The district court (per Judge Camp) entered a temporary stay of execution on June 28th. The court noted that "[n]ormally a prisoner is entitled to federal review of the conviction and sentence for errors of constitutional magnitude," and that Lonchar's petition "presents significant issues concerning the validity of Petitioner's trial and sentence" which had never been reviewed in a federal proceeding. The court also noted the State's argument that Lonchar "may have waived the right to review." Because "the issue of waiver require[d] further consideration," the Court granted the stay and convened an evidentiary hearing.[46]

At the hearing, the following colloquy occurred between Judge Camp and Lonchar:

> Q Now, I understand your point with regard to the manner of execution so that you can donate your organs, that's the point you were making to me a moment ago; is that correct?
>
> A. That's correct.
>
> Q Now, a great deal of the petition goes far beyond that, and alleges irregularities and violations of

[45] Supplemental Brief In Support of Motion To Dismiss, at 4-5 (J.A. 390).

[46] Order, *Lonchar v. Thomas*, No. 1:95-CV-1656-JTC (N.D. Ga. June 28, 1995) (J.A. 63).

your rights that would affect both your sentence and conviction and your sentence of execution in a prior state court proceeding. Is it your wish to pursue those claims through a petition for Federal Habeas Corpus relief? Do you understand my question?

A Yes, your honor. Personally, I have to agree that I have to pursue this position to follow on what I would like to do, so I would have to say to the Court that, yes, I do.[47]

Shortly after the hearing, the court entered an order denying the motion to dismiss and refusing to vacate the stay. In that order, Judge Camp found that "Lonchar is familiar with and wishes to assert the claims in his present habeas petition; however, his purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence." Rather, the court found, Lonchar's purpose was "to delay his execution so the method of execution may be changed to allow him to donate his organs upon his death." (J.A. 58). The court also found that during the federal "next friend" proceeding in 1991, *Kellogg v. Zant*, Lonchar had knowingly and intelligently "waived" further review of his sentence, and that Lonchar offered no reason for failing to pursue habeas relief in that earlier proceeding. The court made no finding that the State suffered prejudice as a result of this conduct.

The court believed Lonchar's conduct would have constituted an "abuse of the writ" under Rule 9(b) of the Rules Governing Section 2254 Cases, had that provision applied. Because the abuse of the writ of doctrine applied only to successive habeas petitions, however, the court held that it could not properly dismiss Lonchar's first petition as an abuse of the writ. (J.A. 61). The Court also held that no common law authority authorized dismissal of Lonchar's petition. (J.A. 62).

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[47] Evidentiary Hearing, *Lonchar v. Thomas*, No. 1:95-CV-1656-JTC (N.D. Ga.), at 18-19 (J.A. 513).

On June 28th, the state filed a motion in the Eleventh Circuit to vacate the stay. The motion stated that "the Rules Governing Section 2254 Cases were not the basis for" dismissing Lonchar's petition. In particular, the state admitted it had not "shown particularized prejudice" under Habeas Rule 9(a), and that it had "not relied on Rule 9(b)," which covers abuse of the writ.[48]

The Eleventh Circuit granted the motion. The court acknowledged Eleventh Circuit precedent that a first federal habeas petition could not be dismissed on the ground that it was filed on the eve of execution.[49] The Eleventh Circuit also took note of this Court's per curiam opinion in *Gomez v. United States Dist. Ct.*, 503 U.S. 653 (1992), which the court read as announcing the principle that a petitioner's abusive conduct "can bar relief even if it is the first time he seeks such relief." Remarking that it "need not be detained, . . . by a debate over whether this case is properly characterized as one involving abuse of the writ or simply a case involving abusive conduct and misuse of the writ," the court held that the district court's stay should be vacated because Lonchar had "abused the writ." The court identified the following considerations as supporting its conclusion: Lonchar failed to explain why he had not filed the petition earlier and had forgone the opportunity to present his claims in the putative next friend proceedings, failed to explain why he had waited until the eve of execution to file the petition, and was pursuing habeas relief for improper reasons.

Lonchar then filed with this Court an application to stay the execution, and simultaneously filed a petition for certiorari. On June 29, 1995, this Court granted the stay of execution and the petition for certiorari. 115 S. Ct. 2640.

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[48] Emergency Motion to Vacate Stay of Execution (June 29, 1995) at 4, 11 (J.A. 383-84).

[49] *See Davis v. Dugger*, 829 F.2d 1513, 1518 (11th Cir. 1987).

SUMMARY OF ARGUMENT

Although this case has followed an extremely unusual and tortured procedural path, its proper resolution is not at all difficult. The free-form "abuse of the writ" analysis applied by the Eleventh Circuit lacks any mooring in the "historical usage, statutory developments, and judicial decisions" that "inform" and "control" a federal court's equitable discretion under 28 U.S.C. § 2254, and should therefore be rejected. *See McCleskey v. Zant*, 499 U.S. 467, 487 (1991). Taken singly or together, the reasons the Eleventh Circuit advanced for its decision do not provide a legitimate (much less a convincing) justification for dismissing Lonchar's petition. Denying Lonchar any consideration of his first habeas petition on the basis of the reasons advanced below would therefore be "contrary to the writ's most basic traditions and purposes." *See O'Neal v. McAnich*, 115 S. Ct. 992, 997 (1995).

First, the ruling below cannot be justified by what the court of appeals described as Lonchar's failure to provide a "good reason for six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition." In Rule 9(a) of the Rules Governing Section 2254 Cases, Congress specifically dictated the circumstances under which a petitioner must justify an alleged delay in the filing of a first habeas petition. As the State conceded below, Rule 9(a) cannot justify dismissal here because the State has not made the showing of prejudice the rule requires. Lonchar was therefore under no obligation to provide a reason for failing to file sooner.

That Lonchar filed his first federal habeas petition shortly before his scheduled execution does not alter this analysis of the significance of the delay in filing the petition. As a general matter, this Court has made clear that a petitioner who makes a substantial showing of a denial of a federal right in a first federal habeas petition should receive a stay of execution to permit consideration of the

petition. *See Barefoot v. Estelle*, 463 U.S. 880, 891-95 (1983); *Collins v. Byrd*, 114 S. Ct. 1288 (1994) (denial of application to vacate stay).[50] Because stays will be requested only after an execution date has been set, the principles set forth in *Barefoot* will typically be applied when an execution date is imminent. Under well-established law, therefore, the imminence of an execution cannot itself establish prejudice sufficient to justify dismissal of a first petition or denial of a stay to permit consideration of a first petition containing a substantial claim of denial of a federal right.

Second, even if the equitable nature of habeas proceedings would permit a departure from those established principles in some cases, no departure is warranted here. To the contrary, the equities cut decisively against dismissal. Throughout the prior proceedings, Lonchar received express assurances from both state and federal courts that he could change his mind and file a habeas petition "at anytime" prior to his execution. And, with respondent's assent, the state court dismissed Lonchar's own habeas petition without prejudice in January 1995, thereby inviting Lonchar to institute new proceedings at a later time. Lonchar's state petition was thus refiled within 6 months of the prior order dismissing it without prejudice; indeed, it was filed within weeks of that state habeas proceeding having become final. In light of these assurances, it would be grossly inequitable—indeed it would be an indefensible sort of entrapment—to hold that Lonchar is disentitled to relief because he did not take advantage of prior options to pursue relief. The

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[50] Save for this case, the Eleventh Circuit has consistently respected that principle. *See Davis v. Dugger*, 829 F.2d 1513 (11th Cir. 1987) (Rule 9(a) does not authorize dismissal of first habeas petition on ground that it was filed shortly before execution); *Bundy v. Wainwright*, 808 F.2d 1410, 1420 (11th Cir. 1987) (stay must be entered to permit consideration of first habeas petition filed shortly before execution if it contains substantial claim of denial of federal right).

Eleventh Circuit's "equitable" analysis gives no hint of even considering these facts, which ought to have been decisive in any balancing of the equities.

More generally, to the extent the judiciary was burdened by a series of next-friend proceedings, that was entirely the result of the conduct of persons other than Lonchar, acting in each instance without his authorization. Had the next-friend petitions never been filed, and had Lonchar merely waited silently until after his execution date was set, even the State concedes his petition could not properly have been dismissed under well-established law. The result should be no different merely because others took unauthorized actions purportedly in his behalf.

Third, the Eleventh Circuit erred in giving substantial weight to Lonchar's subjective motives for seeking habeas relief. Once the district court established that Lonchar intended to pursue the habeas claims set forth in his petition, inquiry into motive should have ceased. The general rule in civil litigation is that an objectively meritorious claim for relief may not be dismissed because it is being pursued for subjective motives that may be improper. This rule is necessary to insure against unwarranted restrictions on citizens' fundamental right of access to the courts. Considerations of judicial administration also favor the rule because no manageable standards exist to govern inquiry into the intractably murky territory of human motivation. These justifications apply with full force in the habeas context.

ARGUMENT

I. LONCHAR'S ALLEGED DELAY IN BRINGING HIS FIRST FEDERAL HABEAS PETITION CANNOT JUSTIFY THE ELEVENTH CIRCUIT'S REFUSAL TO ALLOW CONSIDERATION OF THE MERITS OF THE PETITION

The Eleventh Circuit's ruling rested in substantial part on its conclusion that Lonchar had failed to provide a "good reason" for the "six-year delay" in filing his petition and for waiting until execution was imminent. Effectively, therefore, the Eleventh Circuit required Lonchar to show "cause" for failing to file his petition sooner.

It is well established, however, that the mere fact of delay—even a substantial delay—between a party's conviction and the filing of a habeas corpus petition does not justify dismissing the petition. "[T]here is no statute of limitations governing federal habeas, *and the only laches recognized are those which affect the State's ability to defend against the claims raised on habeas*." *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1721 (1993) (emphasis added).[51] This principle is embodied in Rule 9(a) of the Rules Governing Section 2254 Cases, which specifically dictates the circumstances under which a first federal habeas petition may be dismissed for reasons of delay.[52]

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[51] *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956); *Collins v. Byrd*, 114 S. Ct. 1288 (1994); *Dobbs v. Zant*, 113 S. Ct. 823 (1993); *Richmond v. Lewis*, 113 S.Ct. 528, 531-34 (1992). *See also Davis v. Dugger*, 829 F.2d 1513, 1519 (11th Cir. 1987) ("[n]one of our prior decisions upholding Rule 9(a) dismissals ha[s] involved delays of less than 15 years between sentencing and the filing of the federal habeas petition").

[52] Rule 9(a) provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he

Under this provision, unjustified delay is grounds for dismissal only if the state makes a particularized showing that the delay prejudiced its ability to respond. *Vasquez v. Hillery*, 474 U.S. at 265; *Wise v. Armontrout*, 952 F.2d 221, 223 (8th Cir. 1991); *Smith v. Duckworth*, 910 F.2d 1492, 1496 (7th Cir. 1990); *Strahan v. Blackburn*, 750 F.2d 438, 441, 443 (5th Cir.), *cert. denied*, 471 U.S. 1138 (1985).

Under Rule 9(a), therefore, Lonchar was under no obligation to provide a "good reason for six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition" unless the state first proved the delay prejudiced its ability to litigate the claims in the petition. Conceding it was not able to make the required showing of prejudice, the State specifically declined to invoke Rule 9(a) in the Eleventh Circuit. Requiring Lonchar to provide a "good reason" despite the State's concession, the Eleventh Circuit ignored the plain terms of Rule 9(a). That ruling was particularly inappropriate because the court invoked its equitable powers not to fill gaps in the congressional scheme or otherwise act where Congress was silent, but to transgress a specific limit Congress placed on a court' discretion to dismiss first federal habeas petitions.

Indeed, the Eleventh Circuit applied a legal standard Congress specifically *rejected* when it enacted Rule 9 in 1976. As originally transmitted to Congress pursuant to the Rules Enabling Act, proposed Rule 9(a) would have created a presumption of prejudice habeas petitions filed more than 5 years after a conviction was final.[53] Such a presumption would have shifted to the petitioner the burden of justifying any delay greater than 5 years—a rule virtually equivalent to that applied by the Eleventh Circuit here. After the proposal was subjected to substantial

could not have had knowledge by the exercise of due diligence before the circumstances prejudicial to the state occurred.

[53] *See* H. Rep. No. 1471, 94th Cong., 2d Sess. 5 (1976).

criticism in hearings,[54] Congress amended the proposed rules to eliminate the presumption. The committee report explained that "it is unsound policy to require the defendant to overcome a presumption of prejudice."[55] Congress thus expressly decided not to place any burden on a habeas petitioner to justify even delays exceeding 5 years, unless the state first demonstrated actual prejudice attributable to the delay. As this Court has made clear, where Congress specifically rejected time limits under Rule 9(a), courts "should not lightly create a new judicial rule . . . to achieve the same end." *Vasquez v. Hillery*, 474 U.S. at 265.

The Eleventh Circuit was on no firmer ground in relying on Lonchar's alleged failure to provide a "good excuse" for "waiting to the day of execution to seek relief." (J.A. 550). To begin with, the record simply does not permit the inference—and the courts below made no find-

[54] Habeas Corpus, 1976: Hearings on H.R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976). Rule 9(a)'s presumption of prejudice was generally recognized by supporters and opponents alike as "the most controversial" aspect of the proposed rules because it was "the most serious attempt to change the traditional theory of the writ." *Id.* at 21-22 (statement of Robert N. Clinton, Associate Professor of Law, University of Iowa College of Law); *see also id.* at 47, 50 (statement of Daniel J. Kremer, California Assistant Attorneys General, On Behalf of California Attorney General Evelle Younger and the National Association of Attorneys General); at 107 (statement of Professor Frank Remington, University of Wisconsin Law School, On Behalf of the Judicial Conference of the United States). One proponent of the proposed Rule 9(a) acknowledged that it was "inconsistent with present case and statutory law. Indeed it is. There is no question about that." *Id.* at 49 (statement of Daniel J. Kremer).

[55] H.R. Rep. 1471 at 5; *see also id.* at 5 n.8 ("Those facts which make it difficult for the State to respond to an old claim (such as the death of the prosecutor) can readily be discovered by the State. It is not easy, and perhaps in some instances not possible, for a prisoner to discover those facts that he would have to show in order to rebut the presumption of prejudice").

ing—that by waiting until shortly before his scheduled execution to file a petition, Lonchar was consciously trying to obtain a delay to which he would not otherwise be entitled under applicable law had he acted sooner. And though he interrogated Lonchar extensively on other subjects, Judge Camp never asked Lonchar to explain why he waited until his execution was imminent to file. Indeed, the state conceded before Judge Camp that in the normal course of events (that is, absent the unusual prior litigation history in this case), a stay would have been proper here, notwithstanding that Lonchar's petition was filed shortly before his scheduled execution. June 28, 1995 Hearing, at 5-6 (J.A. 502, 504).

The State's position in the district court reflected established Eleventh Circuit law, *see Davis v. Dugger*, 829 F.2d 1513 (11th Cir. 1987) (Rule 9(a) dismissal not justified merely because delay results in petition filed on eve of execution); *Bundy v. Wainwright*, 808 F.2d 1410, 1420 (11th Cir. 1987) (stay required for petition filed on eve of execution if it contains substantial claim of denial of federal right), and is further supported by *Barefoot v. Estelle*, *supra*. That case makes clear that a person filing a first federal habeas petition should generally receive a stay of execution so long as the petition presents a substantial claim of denial of a federal right. 463 U.S. at 891-95. It recognizes no exception for petitions filed when an execution is imminent. Indeed, judgments about stays will typically arise under those conditions because execution dates are often set a very short time in advance of the scheduled execution. In Georgia, for example, a date is set ex parte and without notice to the defense, only 14 days before the beginning of the "execution window." Many petitions are therefore filed, as was this one, shortly before the beginning of the execution window.

With such a system in place, a rule penalizing the filing of a first federal habeas petition shortly before a scheduled execution would be irrational and unfair. To begin with, such a rule would mean that Lonchar could have avoided dismissal by filing only two weeks earlier. But this two-week delay cannot have affected the State's ability to respond to his petition. Moreover, such a rule would require potential petitioners to make sure they file prior to a "deadline"—the announcement of an execution date—they neither know about nor control. Such a rule would constitute a sharp break with traditional habeas practice, and would effectively nullify Rule 9(a) in capital cases and overrule *Barefoot v. Estelle*.

This Court's recent disposition of the application to vacate the stay in *Collins v. Byrd*, 114 S. Ct. 1288 (1994), also strongly suggests that it is an abuse of discretion to presume prejudice on the basis of a petition being filed shortly before a scheduled execution. In *Collins*, the district court refused a stay of execution to permit consideration of a first federal habeas petition filed eight days before a scheduled execution, but six years after the petitioner's conviction became final. The Sixth Circuit held that the district court abused its discretion in denying the stay. This court unanimously refused to vacate the stay.

Thus, the Eleventh Circuit's ruling cannot be justified on the grounds of Lonchar's alleged failure to explain the timing of his habeas petition.

II. LONCHAR'S CONDUCT DURING PRIOR PROCEEDINGS CANNOT JUSTIFY THE ELEVENTH CIRCUIT'S REFUSAL TO PERMIT CONSIDERATION OF THE MERITS OF LONCHAR'S FIRST FEDERAL HABEAS PETITION

Because a habeas petitioner is not disentitled to relief merely by virtue of the timing of filing of a first petition, the Eleventh Circuit's decision can only be justified if something about the particular circumstances of this case warrants less favorable treatment for Lonchar. The

State has endeavored to make such an argument, on analogy to the "abuse of the writ" doctrine, by arguing that Lonchar acted "abusively" in forgoing prior opportunities to raise his federal claims. Accepting that argument, the Eleventh Circuit held that Lonchar's failure to pursue the claims earlier in the 1991 next-friend proceedings, or in the 1993 state proceeding he filed and then dismissed, jutifies denying him the opportunity to raise them now.

But nothing in these prior proceedings justifies dismissal of Lonchar's petition.[56] To the contrary, the records in those proceedings demonstrate the inequity of the Eleventh Circuit's ruling.

First, far from waiving his claims in prior proceedings, Lonchar had every reason to believe the claims could be brought at a later time, because at every step in the process he was informed by the courts that he could do so. In the 1991 federal next-friend proceeding, *Kellogg v. Zant*, Judge Camp informed Lonchar that:

> "*at any time you can change your mind up until the time your, of course, sentence is executed, and bring a petition for habeas corpus*";
>
> "*if you abandon this proceeding you have to bring one in the future*"; and
>
> "*a habeas corpus proceeding in federal court . . . is the last available means of relief that would be available to you from your sentence.*" [57]

After giving Lonchar this advice, Judge Camp asked counsel to verify that this view of the law was correct. Counsel for both parties assented.[58]

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[56] At the federal level, it is not at all clear how Lonchar could have "adopted" the next friend claims or participated in the proceeding. Had he done so, the claims would immediately have been dismissed for failure to exhaust state procedural options.

[57] Tr. at 443 (emphasis added) (J.A. 447).

[58] Tr. at 444 (emphasis added) (J.A. 447).

Lonchar had received identical assurances from the judge in the immediately preceding state next-friend proceeding. Although Lonchar declined to proceed at the time, the judge told him that "if you change your mind, you still have at least, for the time being an option to proceed." (J.A. 427). As late as the day before his scheduled execution, the court told Lonchar he still had the option to change his mind. Though warning that it might be too late as a practical matter if Lonchar waited until he was strapped into the electric chair, the court was clear that, although the next-friend petition had to be dismissed based on the court's finding that Lonchar was competent, Lonchar could still choose to initiate his own habeas petition even at that late hour: "[Lonchar] certainly has the ability to in effect stop [the execution] for the time being. The stay would in all likelihood have to be entered because there are claims in the petition or any petition that he could file that would require an evidentiary hearing. There is obviously not enough time and a stay would have to be entered." (3/28/90 hearing at 374, J.A. 439).[59]

Similarly, when Lonchar filed his first state habeas petition in 1993, and subsequently dismissed that petition, the State conceded that the petition was properly dismissed *without prejudice* (even going so far as to submit a proposed order to that effect), and the petition was in fact dismissed without prejudice. The State thus invited Lonchar to refile his petition at a later time, indicating in unmistakable terms that Lonchar would suffer no prejudice as a result. That initial order dismissing the petition without prejudice was entered in January 1995. Thus, as late as January of this year—and notwithstanding the Kellogg next-friend proceedings—Lonchar was still receiving assurances from the state court that he could refile later without prejudice. Furthermore, in

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[59] Recognizing Lonchar's continuing right to file an appeal, the judge granted an access order to Lonchar's attorney in case Lonchar changed his mind. 3/28/90 hearing at 378-79, 381.

Lonchar's June 1995 state habeas proceeding, counsel for respondent conceded that there was no evidence of a waiver by Lonchar in any prior proceeding. (J.A. 499).

On these facts, Lonchar's failure to litigate his claims earlier can hardly be called "abusive." Although Lonchar might have pursued his claim sooner in other proceedings, and he did not pursue those claims until his execution was imminent, Lonchar simply did what both state and federal judges expressly assured him he could do—file a petition "at any time" before his execution. Lonchar's conduct cannot constitute a default or an abuse of the writ, and thus cannot shift to him the burden of demonstrating "cause" or otherwise disentitle him to relief.

Indeed, finding Lonchar's conduct "abusive" would be antithetical to elemental precepts of fairness and equity. This Court has repeatedly stressed "fair notice as the bedrock of any constitutionally fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 121 (1991). It is basic that a state may not penalize "a citizen for exercising a privilege which the State had clearly told him was available to him": such action amounts to "an indefensible sort of entrapment by the State." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965) (quoting *Raley v. State of Ohio*, 360 U.S. 423, 426 (1959)). *See also Wainwright v. Greenfield*, 474 U.S. 284, 289-90 (1986); *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976). This is true whether or not the deception was intentional, whether or not the assurances were legally erroneous, and whether or not the assurances affected Lonchar's conduct. *Raley*, 360 U.S. at 438-39; *Johnson v. Ohio*, 318 U.S. 189, 196 (1943); *Greenfield*, 474 U.S. at 291 (in the context of *Miranda* warnings, the government may "induce" action by implicitly assuring that such action will not be penalized).[60]

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[60] *See generally Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61 & nn.12-13 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting).

Second, even apart from these many express assurances, it was improper to penalize Lonchar on the basis of the next-friend proceedings. To begin with, Lonchar should not be held accountable for any delay caused by proceedings instituted without Lonchar's authorization and against his wishes. There is not a shred of evidence or even an allegation—and certainly no finding by any court in this case—that the next-friend petitions were the product of collusion between Lonchar and the next friends, or constituted a deliberate ploy undertaken by Lonchar to extend the period during which his execution would be stayed. Lonchar thus should be in no worse position than he would have been in had the next-friend petitions never been filed.

That conclusion is not altered by the fact that Lonchar was compelled to testify in those proceedings as to whether he intended to pursue relief in his own behalf. The very filing of the next-friend petition made necessary an inquiry into Lonchar's intentions because a putative next-friend has standing only if the real party in interest is incompetent to act on his or her own behalf. In cases where the next-friend files the initial petition, the court's final judgment simply dismisses it for lack of standing. The ruling does not dispose of merits of the substantive claims asserted in the petition. Thus, the judgment itself cannot foreclose the real party from seeking relief in the future. Nor should the real party's testimony have a preclusive effect. At most, the real party will have testified as to a present intention not to seek relief in the future. There is no reason why the real party, by virtue of a third party's unauthorized action, should be forced to make an irrevocable choice whether to proceed in the future that no other person in custody must make. Rather, a real party's essentially involuntary testimony in these circumstances should leave him no worse position than he was in before the unauthorized petitions were filed—*i.e.*, with the right to file a petition later in his own behalf should he choose to do so.

The courts adjudicating the next friend petitions at issue here plainly recognized as much at the time, repeatedly advising Lonchar that he was free to bring his federal claims in the future should he choose to do so. Similarly, if Lonchar's testimony in the initial next-friend proceedings in *Kellogg v. Zant* constituted a waiver of his federal claims, his 1993 state habeas petition should have been dismissed out of hand. Yet the State did not even argue for dismissal on the basis of Lonchar's prior testimony. Similarly, there would have been no need for any inquiry into Lonchar's competence at the subsequent next friend proceeding (*Milan Lonchar v. Zant*) if Lonchar's claims had already been defaulted. Yet both the state and federal courts nonetheless conducted a competency inquiry in the *Milan Lonchar* proceeding, and determined that Larry Lonchar was competent to choose whether to proceed.[61]

Third, Lonchar's conduct simply was not "abusive" in the way that term has traditionally been understood and applied in habeas. "Abuse of the writ" is not a free-form equitable doctrine that authorizes the dismissal of habeas petitions whenever the court determines a petitioner should have acted differently. Rather, the doctrine, as codified in 28 U.S.C. § 2244 and Habeas Rule 9(b), addresses the specific problem of successive habeas petitions. "Abuse of the writ" arose in response to the inapplicability of *res judicata* to habeas corpus, and authorizes habeas courts to dismiss successive habeas petitions if a claim for relief either was adjudicated, or should have been adjudicated, in a prior federal habeas petition. *See McCleskey v. Zant*, 499 U.S. at 481;

[61] Other courts have recognized this as well. *See Smith v. Armantrout*, 865 F.2d 1515 (8th Cir. 1988) (allowing petitioner to pursue federal claims on habeas after § 2254 petition brought by next friend had previously been dismissed because the petitioner competently disclaimed his desire to proceed).

Sanders v. United States, 373 U.S. 1, 8 (1963).[62] But Congress could not have been more clear that an "abuse of the writ" may be found only if there has been a "determination . . . on the merits" in federal court. *See* Rule 9(b); 28 U.S.C. § 2244 (abuse of the writ applies only "[w]hen after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a Justice or judge of the United States release from custody or other remedy on an application for writ of habeas corpus"). Here there never was an adjudication on the merits.

For this reason, this case is entirely different from the only case the Eleventh Circuit identified as supporting its ruling—*Gomez v. United States District Court*, 503 U.S. 653 (1992). *Gomez*, of course, was an extreme case. This Court considered the propriety of a district court order staying the execution of Robert Alton Harris, which had been entered in an action brought pursuant to 42 U.S.C. § 1983 challenging California's method of execution. Harris, however, had previously brought four federal habeas petitions in his own behalf over the course of the preceding decade, and had received final decisions on the merits of those petitions. The stay at issue in the § 1983 proceeding, moreover, had followed closely on the heels of prior orders of this Court vacating stays of execution entered in habeas proceedings Harris filed in his own behalf.

Vacating the stay in the § 1983 proceeding, this Court made indisputably clear that it considered Harris' § 1983

[62] This was due both to the procedural nature of the writ, *McCleskey v. Zant*, 499 U.S. at 479 (absence of *res judicata* "made sense because at common law an order denying habeas relief could not be reviewed"), and to its substantive underpinnings, *Sanders v. United States*, 373 U.S. at 8 ("[c]onventional notions of finality of litigation have no place where life or liberty is at state and infringement of constitutional rights is alleged").

action to be a patent manipulation to avoid the preclusive force of Rule 9(b) and the abuse of the writ principles embodied therein. Had Harris sought to bring his challenge to the method of execution in a fifth habeas petition rather than as a § 1983 action, the claim would plainly have been dismissed as an abuse of the writ because he had previously received four final determinations on the merits of his federal petitions. Thus, even if Harris could technically have invoked Section 1983 to bring his challenge to the method of execution, its use in that case was properly rejected because it amounted to an end run around established "abuse of the writ" restrictions. When the Court spoke of "last minute attempts to manipulate the judicial process," 503 U.S. at 654, it was describing precisely this feature of Harris' conduct. And while the Court considered the last minute nature of the stay request, it did so in the context of a petitioner who had already received four prior determinations on the merits of federal habeas petitions.

This case is nothing like *Gomez*. Lonchar's petition is his first. He has received no prior adjudication on the merits of his federal petition, and thus is not raising new claims that should have been raised in his initial adjudication. Therefore, it simply is not an "abuse of the writ" within the meaning of that term. He is not seeking relief under § 1983 in order to avoid the force of an otherwise applicable procedural bar.

Furthermore, in the last analysis, there is simply no need to recognize a free-form "abuse of the writ" power to avoid problems of the kind the lower courts identified in this case. Ample mechanisms are available for dealing with such problems—and doing so in a way that gives clear notice to litigants of the risk of impending default. The State of Georgia could protect its interest in finality by requiring that a voluntary dismissal of a postconviction petition be with prejudice. This the State explicitly chose not to do here, instead proposing an

order that expressly reserved Lonchar's right to return to court in the future. Georgia could also impose a statute of limitations for state postconviction review—as other States have.

The federal system likewise has the tools available to redress any perceived problems. Within the constitutional limits imposed by the Suspension Clause, Congress could pass a statute of limitations obviating virtually all the concerns raised below—and is presently considering just such a measure. Until now, Congress has affirmatively chosen through Rule 9(a) not to do this. Furthermore, as this Court made clear in *Barefoot v. Estelle*, a federal court can dismiss an initial petition summarily if it does not present a substantial claim of denial of a federal right. Doctrines of procedural default will often provide a basis for dismissing petitions—and will doubtless be raised later in these same proceedings if this Court reverses the Eleventh Circuit.

Although the State has an important interest in the finality of its judgments, *see McCleskey v. Zant*, 499 U.S. at 495, this interest does not lightly trump the fundamental principle that habeas relief is often "the only effective means of preserving" constitutional rights. *Id.* at 478 (internal quotation omitted). Even when a first federal habeas petition is at issue, the state's interest in finality and proceeding with its judgments receives substantial respect through the above doctrines, as well as others such as nonretroactivity and exhaustion. However, as *McCleskey* recognized, "[t]he federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." 499 U.S. at 492-93. After all, "we are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person." *O'Neal v. McAninch*, 115 S. Ct. at 997.

Lonchar has plainly raised substantial constitutional claims that would normally warrant a full airing. Indeed, as a result of his mental illness, and his absence from the trial, there is a very substantial question whether his trial and sentencing proceeding could satisfy even a minimal threshold of reliability. There is simply no basis for refusing to permit federal court review of his claims.

III. LONCHAR'S ALLEGEDLY IMPROPER MOTIVE SEEKING FEDERAL HABEAS RELIEF CANNOT JUSTIFY THE ELEVENTH CIRCUIT'S REFUSAL TO PERMIT CONSIDERATION OF THE MERITS OF LONCHAR'S FIRST FEDERAL HABEAS PETITION

The sole remaining reason for the Eleventh Circuit's ruling—Lonchar's allegedly improper motive—cannot support the extreme result below. It is undisputed that Lonchar genuinely sought the relief requested in his federal habeas petition, and that he presented potentially meritorious claims. The district court specifically found that "Lonchar is familiar with and wishes to assert the claims in his present habeas petition." (J.A. 58) That should have been the end of the matter.

It is well established in other areas of the law that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1931 (1993). Thus, in antitrust cases, a court will not inquire into a litigant's subjective motives for filing suit unless the lawsuit has been found to be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 1928. Similarly, even an "improperly motivated" lawsuit cannot be enjoined as an unfair labor practice under the National Labor Relations Act unless the suit is objectively "baseless." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983).

The same rule applies generally to federal civil litigation under Rule 11. The courts of appeals are in agreement that if "a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate." *Sussman v. Bank of Israel*, 56 F.3d 450, 458 (2d Cir. 1995). *Accord In re Kunstler*, 914 F.2d 505, 518-20 (4th Cir.), *cert. denied*, 499 U.S. 969 (1991); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990); *National Association of Gov't Employees, Inc. v. Nat'l Fed'n of Fed. Employees*, 844 F.2d 216, 223-24 (5th Cir. 1988); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 n.9 (9th Cir. 1986). Courts assessing whether a pleading was filed for an "improper purpose" do not "delve into the attorney's subjective intent." *Sussman*, 56 F.3d at 458 (quoting Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195 (1985)).

As these courts have uniformly recognized, inquiry into the subjective motives for initiating legal action is inconsistent with the fair and efficient administration of justice. Typically, the calculation behind filing a lawsuit will be a jumble of mixed impulses—some entirely legitimate, others more questionable. "A party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper." *Sussman*, 56 F.3d at 459.

Requiring inquiry into a party's subjective motives for seeking relief will force courts into highly indeterminate, unstructured inquiries that will often lead nowhere. Such inquiries will be particularly unwieldly in habeas corpus cases involving condemned prisoners, where issues of the petitioner's mental health and mental capacity will often be central. And these inquiries will—as the record in this case illustrates—often threaten the integrity of the attorney-client privilege. The lack of objective and intel-

ligible standards should preclude an inquiry into subjective motives in § 2254 cases, as it does in other areas of the law. *See O'Neal v. McAninch,* 115 S. Ct. 992, 998 (1995) (noting particular virtues of easily administrable standards "[i]n a highly technical area such as [habeas]"); *see also Professional Real Estate Investors,* 113 S. Ct. at 1928.

An equitable doctrine authorizing inquiry into an individual's subjective motive for filing suit also contains the seeds of a serious threat to the most basic rights of citizens in a free society:

> In our government of laws and not of men, each member of society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

ABA Model Code of Professional Responsibility EC 7-1. Precisely because the inquiry into subjective intent is so indeterminate, it creates too great a risk that citizens will be deprived of their right to pursue legal action. Thus, the Eleventh Circuit should not have considered Lonchar's subjective motives as a factor in its equitable analysis.

IV. EVEN IF THE ELEVENTH CIRCUIT CORRECTLY INTERPRETED THE SCOPE OF ITS AUTHORITY —AND IT DID NOT—APPLYING THESE NEWLY ANNOUNCED STANDARDS TO LONCHAR VIOLATES FUNDAMENTAL FAIRNESS BECAUSE HE HAD NO PRIOR NOTICE THAT HE RISKED FORFEITURE OF HIS HABEAS CLAIMS BY FAILING TO EXERCISE HIS OPTION TO FILE THE CLAIMS EARLIER

Even if the Eleventh Circuit was correct that a first federal habeas petition may lawfully be dismissed without considering its merits on the basis of "abusive" conduct in circumstances other than those encompassed within traditional equitable principles codified in Habeas Rule

9, it was wrong to apply that newly announced rule to bar Lonchar's petition. Generally, a procedural bar must be "clearly announced to defendant and counsel" before it can be invoked to preclude review. *See Wheat v. Thigpen,* 793 F.2d 621, 625 (5th Cir. 1986) (quoting *Henry v. Mississippi,* 379 U.S. 443, 448 n.3 (1965).

That certainly was not the case here. To the extent the Eleventh Circuit's ruling rested on the "last minute" nature of Lonchar's filing, it was a sharp break from prior practice—effectively creating a new species of laches outside the scope of Rule 9. To the extent it rested on Lonchar's failure to avail himself of the next-friend proceedings, Lonchar had no notice that not adopting the claims filed in those proceedings would work a forfeiture of his future right to do so. Indeed, as demonstrated, the courts repeatedly told him the opposite. Thus, it would violate fundamental fairness to apply any default doctrine here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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